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NOTES ON THE EARLY JURISPRUDENCE OF MAINE.

NUMBER TWO.

In our last number, we gave a brief notice of the rude beginnings of judicial proceedings in Maine. The jurisdiction of Massachusetts was gradually extended over this province, commencing in 1652 and consummated by the charter of 1692. It required some time to combine and reduce to shape the various and scattered ordinances and customs under which the different portions of the colony had been governed. Although Massachusetts had, in 1658, procured the forced submission of the inhabitants of Gorges's province, extending to the Kennebeck river, yet it was not until she had secured her title to the soil, by a purchase from Gorges's heirs in 1677, that her authority was implicitly obeyed. After this event, Massachusetts ruled the province by a delegated power; Thomas Danforth was appointed the first president, and held his court at York and Falmouth.

Immediately after Maine became incorporated with Massachusetts by the charter of 1692, the paraphernalia of government was removed from her territory and established at Boston. The general court appointed for Maine a court of "Quarter Sessions of the Peace," and the "Inferior Court of Common Pleas," each to be held four times a year at York and Wells. The first was composed of all the justices of the peace for the county, and had jurisdiction of minor offences, licenses, laying out highways, and a general superintendence of county affairs. The common pleas consisted of four of the same justices, and assembled at the same times and places. After completing the business of the quarter sessions the other court remained in session for the trial of civil actions and such other matters as fell under their jurisdiction.

These courts continued in existence, with little variation, except that in 1807 the number of justices of the sessions was reduced, until 1811, when the inferior court was superseded by the circuit system. A term of the inferior court was not conceded to Falmouth, now Portland, until 1736.

Maine was allowed a superior court, for the first time, in 1699;

then one term a year was granted to it, to be held at Kittery, on the extreme verge of the province: in 1743 it was removed to York. But the *records* of the court were kept in Boston until 1798, one hundred years after the establishment of the court. There appears to have been no disposition in that day, to bring the law home to men's bosoms, but to keep it far from them; perhaps it was an act of mercy to the poor settlers who were beginning the world in this wilderness.

The whole of Maine constituted but one county until 1760, when Cumberland and Lincoln were established. On this occasion an annual term of the superior court was granted to Cumberland: the circuit did not extend beyond this, till 1786, when a term was first held in Lincoln county.

During the whole period of the existence of the inferior court in Maine, from 1692 to 1811, only two of the judges were educated as lawyers.[1] The others were taken from various occupations in life,—merchants, physicians, ministers, &c.—little congenial to the quiet duty of determining the legal rights of litigating parties. Many of them, however, were men of respectable characters, good common sense, and large experience in the ordinary affairs of life.[2]

The judges of this court were paid by fees, and their compensation of course depended upon the quantity of business. The fees varied at different times; in 1762, they were 5*s*. 4*d*. for each entry and 1*s*. for an appeal. In 1776 an entry was 2*s*. and in 1779, 4*s*. At the October term, 1777, in Cumberland, the whole compensation received by the justices was 5*s*. 6*d*. each; there were but eleven entries.

Anciently, when but one court was held in Falmouth, the arrival of the judges, at the commencement of the term, was announced by the discharge of cannon. But the usual summons, while as yet there were no bells, was the beat of the drum.[3]

For more than a century from the foundation of the colony, the path of jurisprudence in Maine is cheered by no light from any legal practitioner. The forms of proceeding, as might naturally be supposed, were wholly shapeless and without symmetry. It was about the year 1720, that we find a resident lawyer, for the first time, practising

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[1] These were William Lithgow, of Georgetown, appointed in 1797, and John Frothingham, of Portland, appointed in 1804. Mr Frothingham was graduated at Harvard College in 1771, became a fellow student with Judge Parsons, in Mr Bradbury's office in Falmouth, and was admitted to practice in Cumberland county in 1778. He died in in 1826, aged 76. Mr Lithgow did not receive a public education.

[2] There were some exceptions to this remark. The Rev. Mr Smith, the venerable journalist of Falmouth, in his diary, under date of October 6, 1747, has the following entry. "I prayed with the court, P. M. Justice Came, drunk all day." Came was from York county and was chief justice of the court.

[3] On one occasion, in York county, the drummer, who was stationed near the court house, having drinked deep of the inspiration of his own music, when the court, headed by the sheriff, in their usual solemn procession approached the house, stepped in front and proceeded with the company into the court house, merrily beating his drum as if he were at the head of a file of soldiers.

in the courts of Maine. This was Noah Emery, of Kittery. He was brought up to the trade of a cooper, but becoming extremely corpulent, he was unable to pursue so active an occupation and turned his attention to the study of the law. But it cannot be said of him, as it has been of some others, that he spoiled a good mechanic to make a bad lawyer. He was quite successful in this new field of labor, in which he acquired much reputation and a large practice. He was a ready draftsman, a man of talents and of good practical knowledge. He died in 1762.

The late Judge Sewall used to relate an anecdote of Mr Emery, which, as it presents to us a picture of the early manners of the bar, will not be inappropriate to this place. It was anciently the custom, when the business of the court was nearly completed, for the members of the court and bar, made up of gentlemen from Massachusetts and New Hampshire, to assemble together at the tavern for a social meeting; on which occasion they constituted a court among themselves, appointing one of their number chief justice for the trial of all breaches of good fellowship which had occurred during the term. On one of these meetings Mr Emery was accused of calling the high sheriff *a fool*. The fact being proved or admitted, the court, taking into consideration the time, manner, and occasion of the offence, ordered said Emery to pay for his offence one *pipe* of tobacco. And ordered the sheriff, who, it is said, was Samuel Wheelwright, to pay *one mug of flip* for deserving the appellation.[1]

Mr Emery was, for many years, the only resident attorney in Maine: but, on all important occasions, the courts were attended by gentlemen of the profession from Massachusetts and New Hampshire. We notice in the diary of the Rev. Mr Smith, to which we have before adverted, that as early as 1754, Jeremiah Gridley and James Otis, of Boston, attended the inferior court at Falmouth, in a great controversy pending between the Plymouth and Pejepscot Proprietors, relative to the title of a large tract of land on the Androscoggin and Kennebeck rivers. This was at a time when the roads were almost impassable in carriages, and it required a week to perform the journey; which was either done on horseback, or by the uncertain conveyance in the very ordinary craft that navigated the coast in that day.

Noah Emery was succeeded in practise by Caleb Emery, his nephew, who also lived in Kittery. The time when he entered upon the profession we have not ascertained, but his name appears upon the records in 1761 as king's attorney. He is represented to have been a man of plain manners, more fond of agricultural pursuits than the excitements of the bar. He survived the revolution, and had retired from business some years before his death. Both of these gentlemen were self-educated, and being the only attorneys in the province

[1] Nicholas Emery, now an associate justice of the supreme court of Maine, is great grandson of Noah Emery.

for several years, they pursued, for a long time, a very successful practice.

As business of importance increased in the state, and after the superior court had been extended to Falmouth, it became more common for distinguished lawyers to visit Maine as a regular circuit. Among those from New Hampshire were Matthew Livermore[1] and his son Samuel,[2] William Parker,[3] and John Sullivan, who was eminent in the field during the war of the revolution and several years president of New Hampshire after the termination of the conflict.

The names of gentlemen from Massachusetts, who practised in our courts prior to the revolution, are more frequent than those from New Hampshire. Among these were Daniel Farnham, of Newbury,[4] John Chipman, of Marblehead,[5] Jeremiah Gridley,[6] Jonathan Sewall,[7] John Adams,[8] and John Lowell,[9] of Boston.

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[1] Matthew Livermore was graduated at Harvard College in 1722. He established himself in the practice of law at Portsmouth, and was appointed attorney general of New Hampshire in 1755. He died in 1776.

[2] Samuel Livermore was graduated at Nassau College, 1752. He was elevated to the bench of the superior court of his native state in 1782, and afterwards became its chief justice. He held the office of senator in congress eight years from 1793. His sons, Edward St. Loe and Arthur, were both justices of the superior court of New Hampshire, and the latter chief justice.

[3] Mr Parker resided in Portsmouth; he received the honorary degree of A. M. at Harvard College, 1722; was appointed judge of the superior court of New Hampshire, and died in 1781, aged 77.

[4] Mr Farnham had a full and regular practice in our courts until the opening of the revolution. He was graduated at Harvard College in 1739. In 1760 he was appointed king's attorney at the inferior court in York.

[5] Mr Chipman was son of the Rev. John Chipman, and graduated at Harvard College in 1738. While attending the superior court, at Falmouth, July, 1768, he was seized with an apoplectic fit and died in two or three hours. He was father of the late Ward Chipman, of New Brunswick, agent of the British government in adjusting the boundary line under the treaty of 1783, and grandfather of the present distinguished chief justice of that province.

[6] Mr Gridley was the most distinguished lawyer of the early time in Massachusetts. He was graduated at Harvard College in 1725, was attorney general of Massachusetts, and died September 10, 1767.

[7] Jonathan Sewall married the daughter of Edmund Quincy, by whom he had two sons, one the late chief justice, the other attorney general of Lower Canada. He was graduated at Harvard College, 1748, but did not enter upon the practice of the law until 1757, having devoted the intermediate time to school keeping and study. In 1767 he succeeded Mr Gridley as attorney general. He was a good lawyer, an able advocate, and ready at all times to apply with skill and effect the weapons of wit and satire. At the commencement of the revolution he was caressed over to the royal party, and did them effectual service by his numerous publications in the newspapers of the day. In the most celebrated of these communications he encountered John Adams, and these able combatants, in 1774 and 1775, under the names of Massachusettensis and Novanglus, maintained a fierce controversy, in which the subjects of disagreement between the colonies and the mother country were ably and fearlessly discussed. He retired to England in 1775 and settled in Bristol during the war; after which he moved to Nova Scotia, where he died.

[8] Mr Adams was graduated at Harvard College in 1755, and studied his profession with James Putnam, of Worcester. He attended court in Falmouth twelve successive years before the revolution. He had been one of Mr Sewall's most intimate friends, until the crisis took place in American affairs. It was while they were attending court

Court week in the little villages which were then the shire towns of this province, was a notable period ; the retinue which accompanied the judges, with the array of jurymen, witnesses and parties, made it an event for which it was necessary to make great preparation, and furnished matter for excitement long before and after the busy scene. A court, too, at that day, was a different affair from what it is at present ; the big wigs and robes, the formal and dignified manners of the judges, in a state of society where the distinctions of classes were much more strictly defined than at present, and at a time when the intercourse between various parts of the country was very limited,— all together made the annual visit of the superior court an epoch to which the people referred in the transactions of life.

When it was perceived that the legal business in Maine was of sufficient importance to attract gentlemen of the highest eminence in the profession, over so long and perilous a journey, as it really was in that day, the attention of young men, who were seeking to establish themselves in the world, was directed to this scene of action.

The first regularly educated lawyer, who took up his abode in Maine, was William Cushing. He was son of John Cushing, for many years a judge of the superior court of Massachusetts, and was born in Scituate, March 1, 1732. His mother was a daughter of Josiah Cotton, of Plymouth. He was graduated at Harvard College in 1751 and studied law with Jeremiah Gridley, of Boston. After his admission to the bar, he moved to that part of the ancient Pownalboro', in the county of Lincoln, now called Dresden. Here he continued in practice until he was elevated to the bench of the superior court, by royal commission, in 1772. He was the first judge of probate, for Lincoln county, in 1760, and was appointed the first chief justice of Massachusetts, in 1777, under the new organization of government. In 1789 he was appointed one of the justices of the supreme court of the United States, and died without issue in 1810.

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in Falmouth, in July, 1774, that the separation between them took place. They were walking, before breakfast, on the hill at the eastern extremity of the town, conversing upon the alarming condition of the country and its future prospects. Neither could convince the other that his views were erroneous, and they resolved never to converse on the subject any more. Mr Adams said, "swim or sink, live or die, survive or perish, with my country is my unalterable resolution." He terminated the deeply interesting conversation by saying—"I see we must part; and with a bleeding heart I say it, I fear forever: but you may depend upon it, that this adieu is the sharpest thorn on which I ever set my foot." After this parting Mr Adams did not meet him again until he called upon him in London, in 1788, as the ambassador of the United States.

[9] Mr Lowell was born in Newbury in 1744 and graduated at Harvard College in 1760. He pursued his studies in Boston and commenced practice in Newburyport, where he soon took a prominent stand at the bar. He moved to Boston before the revolution; was chosen a member of the old congress, and while in this situation was appointed a judge of the court of appeals under the articles of confederation. On the adoption of the federal constitution he was made judge of the district court of the United States, for Massachusetts, which office he held until his death in 1802. He was a man of elevated character and exemplary in all the relations of life. His distinguished son, John, lately deceased, inherited his talents, his energy, and his virtues.

Mr Cushing was a man of great integrity, simplicity and purity of character; his appearance was in the highest degree dignified and imposing. He was distinguished rather for industry and the coolness of his judgment, than for brilliancy of talents. He was the last judge who continued to wear the large wig of the English judges, which gave to him upon the bench an air of superior dignity and gravity.[1]

The next practitioner in Maine was David Sewall, who was born in York in 1735, and graduated at Harvard College in 1755. He pursued his legal studies with Judge Parker, in Portsmouth, and commenced practice in his native town in 1759. He continued a very successful business until his appointment to the bench of the superior court of Massachusetts, in 1777. In 1789 he was appointed judge of the district court of the United States for Maine.[2] Judge Sewall presided in this court with great fidelity and inflexible integrity until 1818, when he retired at the age of 83.[3] This venerable judge died October 22, 1825, without issue. So pure and tranquil had been his life, that, near its close, he remarked to a friend, that if he were to lead it over again, he did not know that he should wish to alter it.

The three persons whom I have just noticed, were the only lawyers resident in Maine in 1760; one added to them completes the number of practising attorneys who had resided here from the first settlement of the colony, a space of one hundred and forty years. These occupied the two extremities of the then inhabited part of the state, leaving the central portion, embraced in the county of Cumberland, without benefit of legal counsel. Up to that period there never had been a lawyer settled in the county. Falmouth neck was then, and Port-

[1] At the time Mr Cushing commenced practice in Dresden, there was no house on the Kennebeck river, from about two miles above Dresden court house to the settlements in Canada, except the block houses at forts Western, now Augusta, and Halifax, now Winslow. A witness in court once speaking of the country, said it was "an eminent wilderness." It is said that Judge Cushing abandoned his large wig on account of the observation it attracted on the occasion of his holding a court in New York. The boys followed him in the streets with silent admiration; but he was not conscious of the cause until he heard the exclamation of a sailor, who came suddenly upon him, "My eyes what a wig!" He immediately changed it for one more suited to the prevailing fashion.

[2] The first capital offence which came before the courts of the United States, under the new constitution, was tried by Judge Sewall in 1790. This was the case of Thomas Bird, who was, in that year, tried, convicted, and executed at Portland for murder on the high seas. Henry Dearborn, who was afterwards secretary of war under Mr Jefferson, and major general in the army under Mr Madison, was then marshal of this court; William Lithgow, of Georgetown, district attorney, and Henry Sewall, now living at Hallowell, at a very advanced age, was clerk.

[3] Conservatism and long duration of office have been more prominent in the United States courts than in any other branch of our institutions. For the space of fiftyone years there have been but *three* judges and *two* clerks in the district court for Maine, viz: Judges Sewall, Parris and Ware, and clerks Sewall and John Mussey. Judge Sewall held the office twentynine years, Parris resigned in four years, on his election as governor, and Ware is in his nineteenth judicial year. Henry Sewall held the office of clerk thirty years, and Mr Mussey, the present incumbent, has held it twentyone years. In Massachusetts they have had but *two* district judges, viz: Lowell thirteen years, and Judge Davis, now in the thirtyeighth year. Judge Story has held the office of circuit judge twentynine years.

land, its successor, incorporated in 1786, ever since has been the largest town in the state. Its business was already of considerable magnitude, both foreign and with the interior; its coasting and West India trade, which now rank it among the primary ports in the country, had then acquired some importance. One term of the inferior court had been held in that place twentyfour years, and a term of the superior court had just been established in it. It might, therefore, reasonably be expected, that a demand would exist for legal talent and assistance. In the absence of persons regularly trained for the profession, resort was had to the next best guides in these intricate matters. We find, therefore, that for some years previous to the time of which we have been speaking, the people were in the habit of employing justices of the peace to commence suits, and prepare causes for adjudication before the courts.[1] After the necessity ceased to exist, by the establishment of regular attorneys in the principal towns, the practice still continued, and so profitable had it become to the persons employed, that they were unwilling to relinquish it. This was considered highly injurious to the profession, the members of which had devoted much time and expense to qualify themselves for the discharge of their duties: they, therefore, in 1770, adopted a rule of the bar, by which the barristers and attorneys, practising in Maine, agreed that they would not "enter, argue, or in any manner assist in the prosecution of causes where the writs shall be drawn by any person not regularly admitted and sworn, except in cases of necessity."

This regulation produced great excitement in that class of persons who had been employed in this practice. The subject came before the superior court, the judges of which refused to permit a person, who had originated such a suit, to manage the cause which had been carried up by appeal; and the attorneys declining, under their rule, to conduct it, the plaintiff was non-suited. Samuel Freeman, son of Enoch, secretary of the provincial congress, and one of the most distinguished in the annals of our native citizens, wrote a long article on the subject in 1773, reflecting severely upon the injustice of the rule and the illiberality of the members of the bar: the next year it was brought before the town, who raised a committee to "represent the lawyer's agreement to the general court and pray for redress." This grievance, however, like many others of that day, was silenced by the more absorbing excitements of a political nature, which had begun to engross public attention.[2]

[1] The practice was for these persons to fill the writs and procure some of the attornies, who attended the courts, to manage the cause after they were entered upon the docket. Enoch Freeman, who was a graduate at Harvard, but bred a merchant, did a large proportion of this business; for April term, 1758, he filled twentyeight writs and fourteen for the next October term. His fee for writ and summons was 8*s*. Mr Freeman was appointed judge of the inferior court, for Cumberland, in 1760, and held the office twentynine years. His son, Samuel, succeeded to this practice.

[2] Samuel Freeman was the person who filled the writ and wished to manage the cause. He was a leading whig at the commencement of the revolution in 1775. At the age of thirtythree he was chosen sole delegate from Falmouth to the provincial

The first lawyer, who had the courage to establish himself in Cumberland county, was Theophilus Bradbury. He was born in Newbury in 1739; graduated at Harvard College, in 1757, and taught the grammar school at Falmouth while he was preparing for the bar. He was admitted to practice at the inferior court in 1761, and immediately opened an office in Falmouth.[1] The next year David Wyer was admitted to the bar of the same court. He was a native of Charlestown, Mass., graduated at Harvard College in 1758, and also taught a school in Falmouth previous to his admission. He is said to have studied his profession in the office of James Otis, of Boston.[2]

These two persons held undisturbed possession of this field of labor and legal fame for more than twelve years. They were always opposed to each other in all disputed actions. With characters totally unlike, the palm of victory inclining first to the one and then to the other, can be awarded to neither, so equal was their contest. Wyer was quick, prompt and full of resources. Bradbury was grave and argumentative, and withal a good special pleader: he had great weight with the court and jury. Wyer was lively and popular, and often succeeded by the vigorous sallies of his wit; when he lost his cause, he frequently gained the laugh and carried the audience. Both had qualities to distinguish them at the bar and give them an elevated position in society.

The next lawyer who established himself in this state was James Sullivan. He was born in Berwick, in this state, and was intended for a life of personal activity, but having fractured his thigh in his youth, he turned his attention to the study of law, which to him was the certain road to preferment. He pursued his studies with his

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congress, and the same year appointed its secretary, which he held three years. The same year he was appointed clerk of the courts for Cumberland, which situation he held *fortysix* years. He was selectman of the town twentyfour years, register of probate thirty years, judge of probate seventeen years, postmaster of the town twentynine years. He was the author of the Town Officer, Clerks' Magazine, and Probate Directory; three works which had a very extensive circulation in their day. He died in June, 1831, aged 89. He filled at one and the same time the several offices of delegate to the provincial congress, its secretary, clerk of the courts, postmaster and register of probate. At a late period of his life, he was at the same time judge of probate, clerk of the courts, postmaster, selectman, president of the bank, president of the overseers of Bowdoin College, and a very efficient officer and member of several literary and benevolent societies. No man's life has been more full of labor and usefulness.

[1] Mr Bradbury, in 1778, removed to his native town and continued in practice until he was elected to congress in 1796. In 1797, he was raised to the bench of the supreme court of Massachusetts, and died in 1803.

[2] Wyer died in Falmouth, in 1776, at the age of thirtyfive. His wife was niece of Thomas Russell, of Charlestown, by whom he had two children. Among other anecdotes preserved of Mr Wyer is the following. While he was engaged in arguing a cause in the common pleas, one of the judges, less acquainted with law than ordinary business, interrupted him with an observation, the force of which he either did not perceive or wished to parry; he promptly replied, "I am glad to find that your honor's opinion coincides with mine." "You are altogether wrong," said the judge, "my opinion is directly against you." "That does not in the least lessen my happiness," replied Wyer.

brother John, at Durham, N. H., and about the year 1768, he commenced practice at Georgetown, in the county of Lincoln. He did not long remain at this place, which had little to recommend it to a person of any ambition; in 1769 he moved to Biddeford, in the county of York. Here he continued until his appointment to the bench of the supreme court of Massachusetts in 1776, when he removed to Groton, Mass.[1]

At the period to which we have now arrived, 1770, there were but *six* lawyers in Maine, viz., Caleb Emery, William Cushing, David Sewall, Theophilus Bradbury, David Wyer and James Sullivan; and it is singular as well as honorable to the bar of Maine, that of the five judges who were appointed by the new government of Massachusetts in 1776 and 1777, *three* commenced and continued in practice in Maine until their elevation to the bench: of these, Cushing was appointed the first chief justice.[2]

The next lawyer who joined this little company in Maine, was Theophilus Parsons, who took his degree at Harvard College, in 1769, and not long after, came to Portland to take charge of the grammar school in that town. While engaged in this employment, he pursued his studies in the office of Mr Bradbury with unwearied assiduity. He was admitted to the bar of the inferior court in Cumberland, July, 1774, and came at once into full practice. In 1774 and 1775, he took a very prominent part in the troubles which were then breaking upon the country, and sustained the cause of the whigs with unabated zeal and activity. Although but twenty-five years old, he was an active member of the committee of inspection in Falmouth, and rendered to the various committees which the condition of the town and country required, the most important services. As the town ceased to afford an opportunity for the pursuit of his profession, or the quiet enjoyment of his studies, he removed to Newburyport, just previous to its destruction, in October, 1775.[3]

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[1] Mr Sullivan was once asked by a friend, how he came to establish himself in so poor a spot as Georgetown; he humorously replied, that "as he had to break into the world, he thought he had better begin at the weakest place." In the early part of the war of the revolution, Mr Sullivan acted as commissary. He was a man of great industry and vigor of mind; at a time when it was not fashionable to make books, he published a treatise on land titles, very useful to the profession in that day, and a history of Maine, which preserved many valuable facts. He was honored by his fellow citizens with numerous offices; he was judge of the supreme court, member of congress, attorney general, commissioner under the treaty of '83 to settle the boundary line, and, lastly, governor of Mass. in which office he died, in 1809.

[2] The names of the five judges were *Wm. Cushing*, Jedediah Foster, *James Sullivan*, Nath'l Peaslee Sargeant and *David Sewall*.

[3] Dr Deane, the venerable minister of the first parish in Portland, with whom Mr Parsons boarded a portion of the time he resided there, and who was a shrewd observer of men, once said of Mr Parsons in a circle of friends, "if that youth lives, he will be one of the first men this country has produced." All know the result of the prediction. Mr Parsons in his school was an excellent disciplinarian, and yet very indulgent to his pupils. He often joined in their sports. On one occasion he was playing football with them, when he accidently fell and one of the boys tumbled over him. In great fear the boy began to make excuses, but Mr Parsons cried out to him, "run on

Timothy Langdon, and Roland Cushing, a younger brother of Judge Wm. Cushing, established themselves in practice, in the county of Lincoln, about this time. Mr Langdon was graduated at Harvard College in 1765, and Mr Cushing in 1768; the former was appointed by the provincial congress of Mass. in 1778, judge of the maritime court for the district of Maine, a tribunal of no inconsiderable importance in time of war. This office he held until the establishment of the government under the constitution of the United States. Mr Cushing was a man of talent, and celebrated for his beauty and the gracefulness of his manners. He died without issue in 1789.

John Frothingham, the next lawyer whom we find in the state, was a native of Charlestown, and came to Falmouth in 1774 or 1775, for the double purpose of teaching the grammar school and pursuing his studies with Mr. Bradbury. He was graduated at Harvard College in 1771, and was admitted to practice in 1778. Mr Bradbury was at this time the only lawyer in the county, and soon after the admission of Mr Frothingham, he returned to Newburyport.[1] The business of the profession was then extremely small, the whole number of entries being, in 1778, but 19, in 1779, 26, and 20 in 1780.[2]

Royal Tyler who was graduated at Harvard College in 1776, commenced practice in Portland in 1779. He remained here but two years, and was probably starved out. He afterwards settled in Vermont and became chief justice of the highest court in that state; he was a good scholar, a sound lawyer, and an accomplished man.[3]

About this time William Lithgow opened an office in Georgetown, in the county of Lincoln. That county seems to have had more attractions at this early day for the profession, than any other in the district, for it numbered now, Langdon, Cushing and Lithgow. It embraced the whole territory east of the Kennebeck, and was, consequently, much larger than any other; its numerous ports, its lumber and fishing business may have afforded encouragement to litigation.[4]

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you rogue, never mind me, we are all boys together now." As soon, however, as playtime was over, he required close attention to study. His rule was never to do but one thing at a time, and never to mingle study and play together. This celebrated man, of whom it is not necessary to speak here, after a life of continued usefulness and increasing fame, as a politician, a lawyer, and a judge, died in Boston, in September, 1813, aged 63.

[1] Mr Frothingham was a man of great purity of character and faithfulness in duty; he was 34 years clerk of the first parish, 12 years register of probate, and 8 years judge of the common pleas. He died in 1826. aged 76.

[2] The whole number of entries in Cumberland Co. for seven years, from 1776 to 1782, both inclusive, was but 198, and the seven following years to 1790, was but 873.

[3] Mr Tyler while in practice here, accompanied a deputy sheriff on board of a privateer lying in the harbor, to serve a writ upon one of its officers. But the commanding officer not liking to part with any of his crew, weighed anchor and bore the civil posse beyond the jurisdiction of the ecourt. He landed the attorney and the officer at an eastern port. "*Leges inter arma silent.*"

[4] Mr Lithgow was not regularly educated; but was a very good advocate and successful in business. He was the first district attorney of the U. S. for Maine. He was a man of good family, a gentleman of the old school, of fine personal apearance and

The next lawyer who appeared in our courts was George Thacher, so well remembered for his humor and for the ingenious manner in which he brought into ridicule the custom of duelling when he was in congress. He was a native of the Old Colony, graduated at Harvard in 1776, and studied his profession in the office of Shearjashub Bourne, of Barnstable. He first tried his fortune at York, in this state, in 1780, but in two years he was induced to move to Biddeford, where he ever after lived, with the exception of four years immediately after the separation from Massachusetts, in which he resided in Newburyport. He had an extensive practice in York and Cumberland, until he was elected to congress under the articles of confederation, from Maine, which then constituted but one congressional district. He was successively re-elected until 1801, when he was appointed an associate justice of the supreme court of Mass. He continued to discharge the duties of this office with great fidelity, twenty-three years. In January 1824, he sent in his resignation, and died the April following. He was a good scholar, always ardent in the pursuit of learning, and a man of infinite wit, benevolence and kind feeling.[1]

This completes the catalogue of attorneys who had taken up their residence in Maine prior to the revolution, and the conclusion of these notes is reserved for a future number.

Portland, Me. W.

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manners. His health failing some years before his death, he moved to Newburyport, where he died.

[1] The affair of the duel we have noticed, which gave Mr Thacher great notoriety, originated and ended in the following manner. Mr Blount of N. C. introduced a bill to the house of representatives on the subject of American coins, in which it was proposed that the pieces should bear upon one side an impress of the eagle. Mr Blount had been a very zealous partizan on the democratic side and had made himself conspicuous in opposition to the administration. On the reading of the bill, Mr Thacher in a vein of irony, offered an amendment to substitute the word *goose* for eagle; and sustained his motion in a very humorous speech. He said the eagle was an imperial bird and an emblem of royalty, while the goose was peculiarly republican, and was connected with classic associations of liberty and republicanism. He remembered in his early reading that it was by the cackling of a flock of geese that the capital of the world was preserved. He had always had a respect for them. Besides, another advantage would attend this alteration, for while the mother bird would be placed upon the large coin, it would be peculiarly appropriate and convenient to put the *goslins* upon the smaller pieces.

This sally of wit convulsed the house with laughter which greatly offended the reporter of the bill. He immediately sent a challenge to Mr Thacher, who promptly replied to the messenger, "Tell Mr Blount I won't fight." "But," said the bearer of the message, "the world will call you a coward if you refuse." "Why so I am," said Mr Thacher, "and he knows it very well or he would not have challenged me. Tell him," added Mr T. "that I have a wife and children at home, who have a deep interest in my life and I cannot expose it without their consent. I will write to them and if they are willing I will accept the challenge. But no, you need not say that; tell him to mark out a figure of my size on a wall and fire at it from the *honorable* distance, and if he hits the mark, I will acknowledge if I had been there he would have hit me." The messenger burst into a loud laugh, and on his return, told the challenger that he had better let Mr Thacher alone, for if he should shoot him, he would contrive to raise a laugh at his expense. The affair was amicably adjusted.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania, December Term, 1839.

BENSEL AND OTHERS v. CHANCILLOR.

Representations by an agent, not in the course of his agency, are not evidence to affect the party with whom he has dealt.

A lunatic himself is competent to plead his lunacy in avoidance of his act: held, therefore that where a lunatic's attorney had conveyed his land in pursuance of an authority executed during the principal's lunacy, a right of entry which the principal might have prosecuted by action, arose when the vendee went into possession; and that subject to the saving, the statute of limitations instantly began to run.

THIS was an ejectment in the district court of the city and county of Philadelphia; the record of which exhibited the following case. In March, 1779, Engle Bensel, being seized in fee, devised the premises to his brother, Doctor George Bensel, for life, with remainder to such of his children and their issue as should be living at his death; and died in June, 1805. Doctor Bensel died in 1827, leaving the plaintiffs his surviving children. This was the title of the plaintiffs; in opposition to which, the defendant showed a letter of attorney from Engle to Doctor Bensel, and a conveyance, pursuant to it, to Edward Burrows, in 1803; and a suite of intermediate conveyances from Burrows to himself. To invalidate which, the plaintiffs gave evidence of Engle Bensel's continued insanity, from before the date of his letter of attorney till his death; and to corroborate it, proposed to show:— 1. A petition by Doctor Bensel to the orphan's court, in March, 1803, praying to have his principal discharged from the guardianship of his neice for insanity. 2. A promise by Doctor Bensel in 1804, to pay Engle Bensel's board and lodging as an insane patient in the Pennsylvania hospital. 3. Memoranda by Doctor Bensel, of a conversation with the deputy register in 1805, at the time of proving the will. 4. An unfinished letter in the hand writing of Doctor Bensel, without date, in which Engle Bensel's insanity was asserted. These items of evidence were rejected, and made subjects of exception.

The action was brought to the June term, 1831; and the statute of limitations being relied on, his Honor, President Pettit, before whom the cause was tried, charged "that the disability or impediment of insanity, ceased with the death of Engle Bensel, in 1805. That although the plaintiffs were then in their minority, the disability of infancy could not be superadded to that of insanity, so as to give the plaintiffs the benefit of the cumulative or additional disability of infancy. That the intervention of the life estate of Doctor Bensel under Engle Bensel's will, did not suspend the running of the statute of limitations, because the possession of Burrows had begun during Engle Bensel's life-time, and before the commencement of the life estate. That as the possession thus begun, had continued, in the whole, for more than twentyone years before suit brought, and as more than ten years of that time had elapsed since the cessation, by Engle

Bensel's death, of the only disability which existed when the adverse possession began to run, the plaintiffs (if there was no fraud on the part of Burrows) were barred from maintaining the present action."

The cause was argued on a writ of error to this court, by *Meredith* for the plaintiffs, who cited, to the admissibility of the rejected evidence, 2 Serg. & R. 384; 4 Binney 386; and 2 Wash. C. C. R. 95; and contended that inasmuch as Engle Bensel, the lunatic, could not have been received to stultify himself, the statute of limitations did not begin to run in his life time, and that the right of entry was preserved in the persons of the plaintiffs, his devises, by their infancy at the time it first accrued; for which he relied on 13 Serg. & R. 356; 3 Binney 374; 6 Watts 506; 5 Rawle 511; Bro. Ab. Tit. Dum fuit infra æt, pl. 3; Littleton sec. 405–6; Cro. Eliz. 398; Gibbons on Limitations 101; Angel 76; 12 Johns 351; 4 Johns 401, 360, 77; and 10 Eng. Com. Law R. 443.

Cadwallader, contra, was stopped.

Gibson C. J. delivered the opinion of the court. The petition of Doctor Bensel, for the removal of his principal for mental incapacity, his agreement to maintain him in the Pennsylvania hospital, as an insane patient, his memoranda of a conversation with the deputy register about proving the will, and his unfinished draught of a letter, are all evincive of an opinion that his principal was insane. But what has his opinion to do with the question whether he was actually so? We know that admissions of an agent in the course of the business committed to him, are evidence against his principal, because they are the admissions of the principal; but we know not on what ground they can be received to affect one who has done nothing to make them his own. To suffer an agent's by-play to impugn his acts, would open a wide field for collusion with his principal. Without, then, a foundation laid by evidence of conspiracy with the party to be affected, no trace of which is discoverable in this record, the agent's surmises that his principal was mad, are incompetent to prove him so.

The remaining point is one about which little more need be said, than that it is ruled by *Thompson v. Smith*, (7 Serg. & R. 209), in which a title that had accrued during infancy, was barred at the expiration of the indulgence allowed to that disability, though coverture had intervened and continued without intermission till suit brought. The principle of that case arises directly out of the words of the statute. "If any person," it is said in the proviso, "having such right or title, shall be, *at the time such title first descended or accrued*, within the age of twentyone years, feme covert, non compos mentis, imprisoned, or beyond sea and without the United States of America," he shall have ten years to bring his action after coming of age, &c. Thus disabilities subsequently accruing, are not provided for; and for that reason the statute, having once started, runs over every obstacle; which accords with the construction, made by the British courts, of the 21 Jac. 1, of which our statute is a transcript—as in *Cotteral v.*

Dutton, (4 Taunt. 825,) and *Duroure v. Jones*, (4 T. R. 310.) Were it not for this, a play of alternate disabilities might keep a right of entry afoot forever. If then there was such a right in Engle Bensel, who, though to be taken for a lunatic, was not an infant, the plaintiffs, who represent him, cannot call their infancy in aid of his particular disability; for though they may have been infants when the land was conveyed by his agent, it was not infancy which prevented him from contesting the validity of the deed by an action.

It is said, that being insane, and consequently incompetent, as it is supposed, to stultify himself, he had not such a right, because he could not prosecute it by action. If that were so, the saving, in cases like the present, would be unnecessary; for the heir or alienee would have a longer period of indulgence without it. To give him ten years from the cessation of the disability, did the statute only then begin to run, would be absurd. But that a lunatic would have a right of entry, notwithstanding a personal incapacity to prosecute it, is evident from the admitted capacity of a committee to prosecute it on her title; for it cannot be pretended that a right of entry founded on the invalidity of a lunatic's act, arises, for the first time, by the finding of an office. In that respect, he might, were it necessary, be put in the predicament of an alien enemy, whose personal incapacity to sue is independent of the existence of his cause of action. But no rule founded on so absurd a supposition as that a man cannot tell whether he was out of his senses, or what he did when he was so, can hold its ground; and the wonder is that it has so long been endured by the British courts. Who, that has conversed with a lunatic, has not heard him, in a lucid interval, speak of what had occurred to him in his paroxisms with entire accuracy; and is it credible that restoration to reason necessarily effaces precedent impressions? That memory is often more intense in madness than in health, that a maniac can sometimes trace the disordered action of his mind through all its wanderings in the wildest delirium, and that he is frequently semi-conscious of the fallacy of his illusions at the time, is shown in a recent narrative of his own case, by an unfortunate son of the unfortunate premier, Mr Percival—a narrative, which, by its minute delineation of the morbid sensibilities, and of the distempered, but preternaturally acute, perceptions of a religious madman, has added more to the stock of professional knowledge in regard to the moral treatment proper for an insane patient, than all that had preceded it thrice told. But that one who has been insane, shall not be received to allege his own infirmity—or to blemish himself, as it has sometimes been improperly called—is by no means settled, even in England, at this day. Till the reign of Henry the sixth, it is admitted, the law was held that he might; and Mr Powell in his treatise on contracts, p. 19, admits that if the reason of the thing coincide with it, the weight of authority might be admitted to be that way; but he thinks it decisive that, unlike infancy, to which it has been compared, insanity may be feigned; and that the law, therefore, precludes the possibility of fraud from it, by precluding an

allegation of the fact from which it might spring. Now, to say nothing of the inconsistency of precluding the lunatic from alleging it, and yet allowing his committee or alienee to give effect to a fraud, if there has been one, by doing so, it may be remarked that the dissimilitude is unfounded in fact, as very clear proofs of infancy may be counterfeited; and I have known, on the other hand, a purchaser overreached by an assumed capacity to convey. On the other side of the question stands the name of Mr Fonblanque, (B. 1 ch. 2, § 1, note f,) who thinks that Fitzherbert's doctrine in opposition to the commonly received opinion, is sustained not only by his authorities but his reasons; and Sir William Blackstone speaks of the notion that a man shall not be admitted to *plead* his insanity, in a tone of evident disparagement. It is, however, but a question of pleading after all; for no one has ever questioned the correctness of the decision in *Yates v. Boen*, (2 Stra., 1104), in which lunacy was given in evidence under *non est factum*. Indeed, that precedent was followed in *Faulder v. Silk*, (3 Camp. 125), and even so late as *Bagster v. The Earl of Portsmouth*, (7 Dowl. & Ryl. 614). Mr Justice Littledale went the whole length of affirming that a deed might be avoided by a plea of lunacy, though in *Brown v. Jodrell*, (3 Car. & Payne 30), Lord Tenterden seemed to think that a lunatic might not be relieved in any shape, unless he had been imposed upon. That, however, was said in reference to a contract for work and labor done, which, without imposition, cannot be avoided by a lunatic or any one else. Finally, in *Tenner v. Myers*, (1 Hagg. Cons. R. 414), it was held for clear law, that a party who was deranged at the time of his marriage, may come into the ecclesiastical court to maintain his own past insanity; and that a defect of capacity from that cause, invalidates the contract of marriage as well as any other. Thus stands the controversy in England.

In the United States, we have an expression of opinion by the distinguished author of the Commentaries on American law, (2 Kent 451) that the doctrine of Littleton and Coke, being manifestly unjust and absurd, has been properly exploded; in which he is sustained by *Webster v. Woodford*, (3 Day's R. 90;) *Grant v. Thompson*, (3 Conn. R. 203;) *Mitchel v. Kingman*, (5 Pick. 431;) and *Rice v. Peet*, (15 Johns. 503.) Whatever, then, may be the rule in England, I take it to be settled in America, that the party himself may avoid all his acts, except those of record, and contracts for necessaries or services rendered, by allegation and proof of insanity. As then Engle Bensel had a right of entry on which he was competent to maintain an action, the bar was complete at the expiration of twentyone years from the date of the conveyance; for the statute, beginning its course by reason of his capacity to regain the possession, ran over the intermediate freehold of Doctor Bensel under the will, and overreached the ten years from the death allowed for this particular disability.

Judgment affirmed.

Municipal Court of Boston, April Term, 1840, at Boston.

COMMONWEALTH v. STEARNS.

Embezzlement:—If an auctioneer being insolvent knowingly and designedly appropriate to his own use the proceeds of the sales of property consigned to him to sell, without the consent of the consignor, it is embezzlement within the meaning and intent of the Revised Statutes, chap. 126, sect. 29.

THE defendant, Thomas Stearns Jr., was indicted upon the 29th section of the 126th chapter of the Revised Statutes of Massachusetts, which provides that if any clerk, agent or servant of any private person, &c., except apprentices and persons under sixteen years of age, shall embezzle, or fraudulently convert to his own use, or shall take or secrete with intent to embezzle, &c., any money or property of another, which shall have come into his possession by virtue of such employment, he shall be deemed to have committed simple larceny.

The evidence in the case proved a consignment of goods to the defendant by Elbridge Gerry, to be sold at auction. The goods were delivered at the earnest request of the defendant, who specially agreed to pay over the proceeds in three days. The proceeds, however, were converted to his own use, without the consent of the consignor, who repeatedly applied for them in vain; and the defendant acknowledged that he had done wrong in appropriating them to his own use, and pleaded his insolvency in extenuation.

Whiting, for the defendant, offered some evidence which was ruled out by the judge, and exhibited the defendant's books of account, which showed consignments and sales of about 3000 dollars worth of goods at five per cent. commissions, equalling 150 dollars, while his expenses of his family and auction establishment during the time of his business exceeded one thousand dollars, and there were other persons whom he owed for goods sold at auction.

After elaborate arguments of counsel upon the law and evidence, and a clear charge from Judge THACHER, the jury found the defendant guilty.

A bill of exceptions has been tendered and allowed, presenting these points, viz:

1. A question was put by the defendant's counsel to a witness, an auctioneer, in these words, "Do you usually separate the proceeds of the different invoices of goods consigned to you for sale at auction; and do you keep the proceeds of each consignment separate; and do you make a general fund of all your receipts on account of the sale of goods at auction, and pay out of this general fund the ordinary expenses of business, as the claims therefor are presented?" *Parker* objected to this, as irrelevant, and as an attempt to prove a usage contrary to law. The judge ruled out the answer as inadmissible and allowed the exception.

2. To another auctioneer, the defendant's counsel put this question,

"Is it the common custom of auctioneers to sell, at the same sale, goods out of different consignments—to mingle the funds received from these different sales, and to pay out the amounts of the sales just as they happen to be called for by the consignees?" Evidence of such custom was objected to, and was ruled out, and the exception allowed.

3. The judge, among other things, instructed the jury, that if the defendant knowingly and designedly appliedt he money to his own use, either to the payment of his debts, or his expenses of business and living, without the consent of Gerry, it was a clear breach of trust, and an act of embezzlement within the meaning and intent of the law aforesaid. To this, exception was made by the defendant's counsel, and allowed.

4. The counsel for the defendant also requested the judge to instruct the jury, that "auctioneers are not such agents, servants, or clerks of private persons or corporations, as are intended by the 29th section of the 126th chapter of the Revised Statutes." The judge refused so to do, but on the contrary instructed them *that an auctioneer was within that provision*. This ruling was also excepted to, and the exception was allowed.

The case has gone to the supreme judicial court on these exceptions. We mention it now principally for the purpose of introducing the remarks of the attorney of the commonwealth for Suffolk, respecting the common and statute law, in relation to the crime of embezzlement.

Mr Parker, in opening this case to the jury, said he believed it was the first instance of an auctioneer being indicted for misappropriation of the proceeds of a sale; and from the novelty as well as the interesting nature of such a trial, he would take some pains in expounding this branch, which might, in Massachusetts, be called a new branch, of the criminal law. It might be said, that one of the predominant vices of the present age, has been FRAUDULENT APPROPRIATION. This evil has been seen in public station as well as in private life. Instances too notorious to need being expressly named, would occur to the recollection of all persons conversant with the history of the last ten or twelve years, of men high in stations of public trust, and also of many officers of money-corporations, sacrificing their probity, honor, character, and happiness, by yielding to the temptations of circumstances, and the examples of lax morality, which surrounded them; and these lamentable corruptions on a great scale, have, in many instances, swept away, by their influence, the barriers of virtue and integrity in the more sequestered scenes of private transactions. Crimes of violence in relation to property, are becoming uncommon; while crimes of fraud have increased in a surprising ratio. In the recapitulation of the fourth table in the late very valuable annual report of the attorney general of this commowealth, the number of *convic tions*, during the year 1839, for offences against property *with* violence, are stated to be 13; and for offences against property *without*

violence, were 576. From this change in the commission of crimes, it became the duty of legislators to introduce corresponding checks by new criminal laws ; and efforts are now making, both in the parliament of Great Britain and in the congress of the United States, to stamp embezzlement with the turpitude, and expose it to the punishment of felony. In Massachusetts it has already been done.

Though the clause of the statute on which this indictment is founded, was first introduced in this commonwealth only about six years ago, (in 1834) there were some persons punishable criminally for embezzlement many years before. In 1791, persons employed in the treasury of the state, who committed fraud or embezzlement therein, were to be most severely punished ; and in 1824, bank officers guilty of embezzlement might be sent to the state prison for ten years ; but it was only in 1834 when *all persons*, agents, clerks, servants, carriers, &c., who were guilty of this offence, were adjudged criminals, and deemed guilty of simple larceny, if the property exceed one hundred dollars in value, and may be punished by five years in the state prison.

But there are three offences, falling under the head of fraudulent appropriation, all of which are criminal violations of the right of property, the boundary lines of which so nearly approximate each other, that care must be taken to prevent their being blended : namely,—(1) those thefts which are called constructive larcenies ;—(2) the obtaining goods or money by false pretences with intent to defraud ;—(3) embezzlement : and in some of these cases, it is not always easy at first sight to distinguish them from *breaches of trust*, which are considered as moral and *civil* delinquencies, rather than as punishable *criminal* acts.

Theft implies a wrongful taking by force or by fraud ; while embezzlement implies an actual fraudulent conversion of property consequent upon a lawful possession entrusted to a person subject to some specific duty or obligation.

Between theft and obtaining goods by false pretences the distinction is this : when the wrongful taking is obtained with the consent of the owner by fraud, if *the possession* of the goods only is obtained, it is theft ; but if the *right of property* as well as the right of possession is obtained from the owner by false pretences, then it is not theft, but the other offence ; because when possession is obtained by fraud, there is a material distinction between the consent to part merely with *the temporary possession* of property, and the consent to part with *the entire interest*. In one case, the same property is to be returned *in specie* ; in the other, it is never to be returned.

The English commissioners on criminal law, say it is questionable whether the offence of obtaining moveable property by false pretences ought not rather to constitute a branch of the law of theft than a substantial distinct offence. But our Revised Statutes consider them as separate offences, while they have in a great measure abolished the distinction between embezzlement and theft, for they declare that

whoever is guilty of embezzlement shall be deemed guilty of simple larceny. This is an advance beyond the English law.

There is undoubtedly a difficulty in some cases of distinguishing embezzlement from simple breach of trust. Mere abuse of confidence is not always criminal; and there may be wrongful appropriations without a fraudulent intent. In the absence of overt acts plainly manifesting a want of good faith and the intention to defraud, it may well be questioned whether the prosecutable crime of embezzlement has been committed.

To elucidate the subjects more clearly, a few cases may be supposed.

If a man go to a livery stable keeper, and hire a horse and chaise under the false pretence that he is going to Plymouth upon some special business, and ride off with them to Worcester and there sell them, and abscond with the money, it would be theft, if he used the contract only to get possession of the property, because the owner parted only with the temporary possession of the horse and chaise, and not with the right of property in them—for they were still his—and to be returned to him in specie, that is, *the same articles* were to be returned.

If a man go to the market-house, or a shop, and *falsely* tell a butcher or a shopkeeper that he is your house servant, and you had sent him to get a piece of meat or some goods for you on your credit to be consumed in your family, and the butcher or the shopkeeper, deceived by his pretences, deliver the property to him and charge it to your account, and he fraudulently converts it to his own use, that would not be theft in him, because the butcher or shopkeeper parted not only with the possession but *the right of property* also in the article delivered;—he sold it, and never expected it to be reurned;—this would be the crime of *obtaining goods by false pretences* with intent to defraud.

If you had a clerk in your shop, who was employed in selling goods for you, and he fraudulently converted to his own use without your consent any goods delivered to him for sale on your account, or the money he received for your goods in your shop, it would not be larceny by the English law, because the goods and money came *lawfully into his possession* by virtue of his employment, and by no false pretence or fraud; there was no original wrongful taking of it, but a consequent actual, fraudulent conversion after a lawful possession;—but he would be guilty of embezzlement, both under English and Massachusetts law, and our Revised Statutes, moreover, add that by so doing he shall also be deemed to be guilty of simple larceny.

Here was a general employment, but our statute makes no distinction between general and special agents; nor between common servants, and a servant for a single act; nor between a permanent employment, and an employment on one particular occasion. It comprehends all of them, and requires fidelity, good faith and strict honesty in all persons trusted with the possession of other men's property for a specific purpose.

A breach of trust may be distinguished from the preceding crimes in this way: all those are characterized not only by the absence of good faith, but by the fraudulent intent manifestly shown and carried into execution by an immoral and illegal conversion, which never exist in a simple breach of trust. If you put one hundred dollars into the hands of a friend to purchase a horse, or a watch, or any other thing for you next week, and he mixes it with his own money, and imprudently lends it to another, whom he believed was solvent and would repay it before the time, or if he uses it himself for his own benefit, believing or knowing he had the means and honest intent to replace it, and it becomes wholly lost to you, there would be a wrongful appropriation of your money without your consent, but no crime because no fraudulent intent; he meant to do right, to act fairly, and do as he agreed, but imprudently put it out of his power; there was no intentional violation of good faith; the motive was not corrupt; his heart was right, and the criminal fraudulent intent never entered it. In all cases the general criterion of crime is a wrongful, premeditated intention, plainly manifested by an overt act.

The experience of mankind in commercial countries, where much confidence and for large amounts is necessarily placed in clerks, agents, and others, has found it necessary to guard against fraudulent appropriation by severe laws, and thus protect property unavoidably exposed to the possession of irresponsible persons; and for this beneficial purpose the principle of our law applies to every species of employment, in which one man for any special purpose intrusts another under any contract, express or implied, or other lawful authority, with the possession, or with power to take or deliver possession, of any of his moveable property, and that other person wrongfully and fraudulently embezzles the same, or any part, or proceed thereof. Auctioneers, factors, brokers, agents, attornies, collectors, carriers, &c., are within the purview and letter of the law; and the language of the statute being very clear in its description of persons, the only question that can arise on the trial is, whether the evidence in the case proves the premeditated fraud, the essence of the charge. If there be any novelty in this prosecution, it is because the Statutes in this state have but recently made other persons besides clerks in the state treasury, and bank officers amenable to criminal prosecution for embezzlement; and it will be well, if it should now be extensively known how very broad and comprehensive the scope and the words of the law are.

There may be difficulties in the proof; but there is a safe rule to guide the jury in the discharge of their duty, and one which will guard them from mistaking a breach of trust for a crime. It is this: Whenever the evidence satisfies the jury that a man, employed as an agent, servant, broker, auctioneer, carrier, or otherwise, by his overt acts and conduct respecting another man's property, which came to his hands lawfully by virtue of his employment, for a specific purpose, shows himself destitute of good faith, and plainly manifests his inten-

tion fraudulently to convert it to his own use without consent of his employer, and to defraud, especially if he be in insolvent circumstances and knows he puts it at hazard, and actually does embezzle it, they are to consider him guilty under this law, and acquit him when the testimony does not so satisfy them.

A brief review of the *progress* of the law on this subject, as indicated by legislation and the decision of the English courts, and the subsequent statutes passed by the legislature in Massachusetts, will remove all misunderstanding and mistake in the application of the principles of law to the case on trial; and it will be found, that embezzlement occurs in cases where credit is given rather to the employment, the station, the office, the relation, than to the man personally, or his property. Tellers in banks are trusted with hundreds of thousands of dollars, whose note would not be discounted for any sum. So auctioneers may sell large cargoes, whose note would not be taken for a single bale of merchandize.

The statute of 33. Henry 6. ch. 1, made it felony in *servants* making spoil of their masters' goods at his death. This was the first statute on the subject.

The statute of 21. Henry 8. ch. 7, (made perpetual by 5 Eliz. ch. 10.) was declaratory of the common law, and explicitly declared embezzlement by servants of goods committed to their charge to be felony.

The statute of 12. Ann. ch. 7, debars servants offending in some of these particulars, from the benefit of clergy. A series of decisions under those statutes and the common law are collected in 2. East. P. C. 565, &c.

The statute of 12. Geo. 1. ch. 32—and 15. Geo. 2. ch. 13, affected bank officers. Other statutes punished clerks in post offices and other public employments.

Bazely's case in 1799, (2 Leach 973) made the English Parliament pass 39. Geo. 3. ch. 85, to remedy a palpable defect in former laws manifest in that trial.

The 17. Geo. 3. ch. 56, punished embezzlement by manufacturers for goods delivered for manufacture; and the 52. Geo. 3. ch. 53. applied to agents.

The 3 and 4. W. & M. ch. 9, sect. 5, punished lodgers, who embezzled any chattel, bed, bedding, &c.

The 7. and 8. Geo. 4. ch. 27—and 2. and 3. Wm. 4. ch. 4, are the most recent English acts. The English commissioners recommend a further extension of the laws.

In Massachusetts the first statute related to clerks in the treasury office—statute of 1791, ch. 59, sect. 5. Next the Statute of 1824, ch. 51, extended to *bank officers*.

But by the statute of 1834, ch. 186, the utmost extent of the English statutes and adjudications were introduced into our law. That act was drawn by one of the most learned lawyers in the commonwealth, who also had been the attorney of the commonwealth in a neighboring

county. He had carefully studied the English law on this subject, and clearly and avowedly intended to go beyond them and clear our law from technical difficulties.

In reviewing this statute, the commissioners say they have made a few alterations, and the sections of the Revised Statute have substantially incorporated it into the present code. See ch. 126, sect. 27, 28, 29 and 30, and ch. 133, sect. 10 and 11.

There have been some decisions in England which will serve to explain our statute, because it is probable that they were well known to him who penned the Massachusetts act, and that that statute was drawn with reference to them, and I shall select only those which elucidate the case now on trial.

In 1807 in the case of *Rex v. Hartley*, (Russ. & Ryan's Crown cases 139.) the captain of a barge, who carried out coals to sell and was to have two-thirds of the price for which he sold the coals after deducting the price charged at the colliery, was held to be a *servant* within the meaning of the act.

In 3. Chitty's Criminal Law, 985, is a precedent against a broker for embezzlement.

In *Rex v. Carr*, (Russ. & Ry. C. C. 198.) in the year 1811, a person employed upon commission to travel for orders and to collect debts, was held to be a clerk under the act, though he paid his own expenses out of his commission on each journey, and did not live with his employer, nor act in his counting-house.

In *Rex v. Spencer*,(R. & R. C. C. 299,) in the year 1815, a man was held sufficiently to be a *servant* under the act, although he was only occasionally employed, and although it was the *only instance* in which he had been employed to receive money.

In *Rex v. Hughes*, (Moody's C. C. 370,) though employed only in a single instance the prisoner was held liable.

Supreme Judicial Court, Massachusetts, March Term, 1840, *at Boston.*

CAPEN AND OTHERS v. CREHORE AND OTHERS.

Equity:—Two persons having been engaged in land speculations, one conveyed to the other all his interest in the tracts which they held together, taking a bond for reconveyance upon certain conditions. Upon a bill for a specific performance, it was held, that the parties stood in the relation of mere contracting parties and not as trustee and cestui que trust; that they were not partners, and a charge made by one for services on the lands was a proper one; that an amount of money remitted by one and lost was not at the risk of the other; and that, under the circumstances of the case, one of the parties could not charge extra interest for money furnished by him although worth it in the market.

THIS was a bill in equity, brought to compel a specific performance under the following circumstances.

The plaintiff alleged that certain persons, in March, 1832, gave to Aaron Capen and Edward Crehore a bond of three-fourths of a township of land in Maine, upon certain conditions stated in the bill; that Edward and Aaron paid, each, one half of the cash payments, and gave their joint and several notes for the remainder; that for the purpose of raising the money for the cash payment, they gave their note to the Market bank for about $5000, which Crehore paid at maturity, and Capen thereupon gave Crehore his note for his half of that sum, $2580 31.

The bill farther stated, that about August of the same year, Capen and Crehore took a bond from the land agent of Massachusetts for the conveyance of Sugar Island, so called, in Maine; that each paid one half of the cash payment; and Crehore made the second payment and Capen gave him his note for his half, $365 80; and both gave their notes for the residue of the purchase money. The bill then stated that in January, 1832, the parties took a bond for the conveyance of Deer Island, in the state of Maine, and gave their notes therefor; that Crehore paid one of the notes and Capen gave Crehore his note for his half; that afterwards, large quantities of timber were cut from the township and islands and the proceeds came into the hands of Crehore; that on Feb. 22, 1834, Capen conveyed to Crehore, all his legal and equitable interest in the township and islands and took a bond from him in return upon the following conditions; that if Capen should at any time within five years from its date reimburse to Crehore one moiety of all sums of money paid by him for the property, and of all that he might remain liable for and should pay thereafter, and of all monies paid on account of contracts for timber, and of all his other disbursements in those transactions, and interest in all cases where interest had accrued, and give a bond for the payment of his moiety of all future expenditures, and to indemnify Crehore from all cost by being obliged to pay more than one moiety, and should pay two notes, mentioned in the condition, then Crehore should reconvey to Capen a moiety of all the lands and lumber not previously sold by said Crehore and interest in the same and in all contracts growing out of the same, and should account for one moiety of the receipts of all sales of land and lumber by him made. The bill then charged that Crehore had since that time realised large sums from the proceeds of lumber and the sale of land, and that Capen had performed services to the amount of $3000, which should be credited to him on account between the two. There were many other allegations and details in the bill, which particularly affected other parties than Capen and Crehore, but which were not important for the purpose of the present hearing.

The case was argued at this term upon exceptions to the master's report to whom was referred the accounts between the parties. Each claimed a large balance in his own favor, but the master reported that

Capen had a right to reconveyance from Crehore and that Crehore was indebted to him $958 85.

The defendant objected upon the following grounds.

1. That the master had allowed to Capen for personal services about the lumber on the township and islands at the rate of $1200 per year for two years and nine months after the date of the bond,—contending that it was inequitable and unconscionable, (1) because Capen was operating upon his own property and received pay in the privilege of coming in to share the profits of the enterprise at his own election after the whole risk of the enterprise had been borne by the defendant, (2) that he was in equity a partner and not in the relation of servant, but trusting for his pay to expected profits when re-instated and escape from losses if he should choose not to come in; the services rendered thus being all the risk which he assumed.

2. The second exception was, that the master did not charge Capen with one half of $500, which had been remitted by mail, by Crehore, and lost or stolen, contending that Crehore had the right to assume the risk for the benefit of both parties in order to avoid the expense of a messenger, there being no other mode of remittance.

4. The fourth exception was, that Crehore should be allowed reasonable commissions for managing the business transactions, payments, sales, &c., and should be allowed a moiety of all sums paid as extra interest for raising money to meet the engagements made for the benefit of the concern, instead of which the master had allowed only the legal interest and no commissions.

Sprague for the plaintiffs.

Fuller and *Russell* for the defendants.

WILDE J., after stating the substance of the bill said, the first objection by the defendant to the master's report, that too much was allowed to the plaintiff for services on the ground, among others, that Capen and Crehore are to be considered in equity as partners, cannot be maintained. The decision of the master was well supported by the evidence before him as well as by the general principles of law applicable to the case. The court are also of opinion, that the second exception to the master's report for disallowing the charge made by Crehore for one half of the five hundred dollar bill which was lost, cannot be allowed. Crehore did not hold these lands as trustee, and the parties did not stand in the relation of trustee and cestui que trust. Nor were they partners; but they were contracting parties. The simple question is, then, whether by the terms of the bond, Capen can be considered liable for half of this five hundred dollar bill. He clearly cannot be. We think there was great want of care in remitting the money by mail. It might have been deposited in a bank and a check sent, or a bill might have been sent in two parts, so that this loss probably would not have happened.

In regard to the defendant's charge for commissions, they were not agreed to be allowed in the bond. If he had hired the money, he

might, perhaps, recover extra interest if he was obliged to pay it, but if he merely advanced his own funds he could not charge extra interest, even though the money would bring it in the market. On the whole, the court think the master decided correctly upon the evidence before him, and his report must stand.

JOHNSON v. SUMNER.

It seems, that personal property, mortgaged to secure future advances, can be reached only by means of the trustee process.

Question in regard to the sufficiency of the demand by a mortgagee of personal property, of the officer who attached it. Held, that a demand not made under a year from the time of the attachment, was within a reasonable time, under the peculiar circumstances of the case. Held, also, that interest could be computed only from the date of the demand.

TROVER against the late sheriff of Suffolk for a quantity of pine boards, which were taken by Daniel Parkman, one of the defendant's deputies, on a writ in favor of Samuel Harris and Daniel Jones against Merret & Bush. The plaintiff claimed the property by virtue of a mortgage to him by Nathan Frost. The writ was dated January 4, 1837. On the 7th of the same month, notice was given to Parkman, that the lumber in dispute belonged to the plaintiff, and a suit was commenced, but was finally abandoned; and on April 25, 1838, another notice was given by the plaintiff, in which he demanded the restoration of the lumber and set forth the mortgage and a specification of certain debts alleged to be due to him from said Frost, and of certain promissory notes, on which he alleged himself to be liable on account of said Frost as surety.

The amounts due to the plaintiff, or for which he was liable, were specified as follows:

"The amount of money due to me from the said Frost at the time of said taking by the said Parkman was eight hundred and fifty-eight dollars, and the whole of said sum still remains due to me from the said Frost; and I was, at the same time, *liable*, as surety, guarantor, or joint promissor to pay for and on account of the said Frost three promissory notes, amounting in all to fifteen hundred and twenty five dollars, which notes are still outstanding and unpaid, and I am still liable to pay the whole of that sum, by reason of my liability upon said three notes;—at the time of the making of said mortgage, and of said taking, I was liable for sundry other large sums on account of said Frost, from some of which I have since been relieved. I, therefore, demand of you and of each of you, the aforesaid sum of eight hundred and fifty-eight dollars with interest from the time of the taking of said lumber, and I further demand to be secured and held indemnified and saved harmless from and against all my liability upon said three notes, amounting in all to the said sum of fifteen hundred and twenty five dollars;—and in default of being thus paid, and in-

demnified, and saved harmless, I claim to hold the said boards, taken and carried away as aforesaid, free from all attachments and from all interference or hindrence of or from any and all persons whatsoever."

At the trial before *Wilde J.* at the November term, 1838, certain objections by the defendant to the plaintiff's right to recover were overruled and reserved for the consideration of the whole court, and a verdict was rendered for the plaintiff.

Henry H. Fuller for the plaintiff.

James T. and *Ivers J. Austin* for the defendant.

Shaw C. J. Where the condition of a mortgage of personal property is to save the mortgagee harmless for *future advances*, there seems to be no mode by which the mortgaged property can be attached. The provision in the Revised Statutes respecting the attachment of mortgaged property, does not seem to apply to a case where the mortgage is given as a security for future advances; and we think the only mode of reaching the property in such a case is by summoning the mortgagee as trustee. But this is on the supposition that the mortgagee is *in possession* of the property.

This point, however, does not arise here, the principal question being in regard to the sufficiency of the notice given by the mortgagee. We do not think the objection of the defendant to the form of the notice is valid. The amount actually due exceeded the value of the property, and the amount stated in the notice was actually less than the amount of principal and interest for which the property was liable. It is proper in these cases to include the interest because the mortgaged property is liable for that as well as for the principal.

Another question in this case relates to the reasonableness of the time when the notice was given and the demand made. More than a year elapsed before this demand was made, and unless there was something to explain this we should think that the demand was not made within a reasonable time. But under the circumstances of the case—one notice having been given and a suit commenced before the present suit was commenced—we think the demand and notice were within a resonable time.

Another question arose as to the amount of interest, whether it should be computed from the time of the date of the demand and notice, or from the date of the attachment. The form of the action is decisive of this point, and interest is to be computed only from the time of the demand.

Judgement on the verdict.

GIBSON v. COOKE.

Where an estate was left to a person in trust to pay over the rents to certain devisees, and the estate was taken for public uses and a compensation paid to the trustee; it was held, that the money received was a part of the capital of which the devisees could receive the interest only.

BILL in equity by the plaintiff to compel the defendant to account for certain funds in his hands. The bill set forth, that the plaintiff's mother left certain real estate to the defendant in trust, to collect and receive from time to time the rents, issues and income, and after paying the necessary expenses of repairs, &c. to pay over to the children of the testatrix, of which the plaintiff was one, the nett proceeds quarterly; that a part of the estate so devised was taken by the Boston and Worcester rail road corporation and the sum of four thousand one hundred ninety-seven dollars and sixty-one cents was paid to the defendant as compensation for the land so taken. The bill concluded with a prayer that the defendant might be compelled to pay over and distribute among the devisees the amount so received by him.

The defendant, in his answer, admitted the allegations contained in the bill to be true, but stated, that, believing the money received from the estate taken by the rail road, to be a part of the capital not to be disturbed, he had caused the same as such to be duly invested on interest, and had from time to time quarterly since included the interest with the other rents of the estate, and distributed the same among the devisees aforesaid.

Cruft for the plaintiff.

Cooke, pro se.

SHAW C. J. The question is, whether the devisees are entitled to the whole of the money received from the rail road corporation, or only the interest on it. It is a very clear case, that the defendant has done right in investing the money and that it is to be considered a part of the capital, of which the devisees are to receive the interest only.

Bill dismissed with costs.

PEDRICK v. WHITE AND OTHERS.

Equity:—A supplemental bill cannot be filed as a matter of course and without leave of the court first obtained upon sufficient cause shown.

THIS was the case of a demurrer to a supplemental bill. Several causes were assigned, of which the two principal were, that the bill was irregularly filed and that it did not appear that the matter was newly discovered.

Choate and *George Minot* for the plaintiff.

C. P. Curtis and *Brigham* for the defendants.

SHAW C. J., in delivering the opinion of the court, said, the

chancery jurisdiction of this court being of a comparatively recent origin, we are obliged to proceed with great caution in matters relating to practice. It appears to be a well settled rule, that a supplemental bill ought not to be filed as a matter of course and without leave of the court first obtained upon sufficient cause shown. In such cases, it ought to appear generally, *first*, that new matter has arisen since the original bill was filed ; *second*, that the facts contained in the supplemental bill have first come to the plaintiff's knowledge since the case has passed that stage, when it might have been amended ; and *third*, that the plaintiff has been unable from inadvertance, or other sufficient cause, previously to avail himself of these facts. These three things must be shown by affidavits, or by some other satisfactory way, before the court will grant leave to file a supplemental bill. It has been argued that the demurrer in this case was irregular. Perhaps a more proper course would have been a motion to dismiss ; but it is not necessary to decide that question, as the plaintiff has *moved for leave* to file a supplemental bill, and the court think it is not too late for that to be done.

BENT AND ANOTHER v. HARTSHORNE.

Construction of a written guaranty by which the guarantor agreed to become responsible to a certain amount, for purchases made by his brother.

ACTION upon a guaranty, given by the defendant to the plaintiffs, to induce them to give credit to Harvey Hartshorne, the brother of the defendant. The guaranty was as follows:

"MESSRS BENT & BUSH.

Gentlemen,—I hereby agree to be responsible to you for the price of hats and other goods purchased of you, either by note or account, by Harvey Hartshorne at any time hereafter, to an amount not exceeding in all the sum of one thousand dollars. ROLAND HARTSHORNE."

The plaintiffs accepted this guaranty and sold to Harvey Hartshorne goods to a considerable amount. From time to time Harvey made payments to the plaintiffs on account of the goods thus sold, and exceeding in amount the sum of one thousand dollars, which payments were credited generally to his account ; but there was constantly due to the plaintiffs from Harvey Hartshorne ever since said guaranty was accepted, a much greater sum than the amount mentioned in the guaranty. In 1837, Harvey Hartshorne died insolvent, and this action was brought to recover of the defendant the sum of one thousand dollars upon the guaranty. The case came before the court on an agreed statement of facts.

B. Rand for the plaintiffs.

Crowninshield for the defendant.

SHAW C. J. The plaintiffs contend, that this was a continuing guaranty and as no notice was ever given to them by the defendant that he revoked the same, they are entitled to recover. The defendant contends that this was not a continuing guaranty, and that Harvey Hartshorne having purchased of the plaintiffs, goods to the amount mentioned in the guaranty and having paid them, on account, a sum equal to one thousand dollars, the defendant's obligation on the guaranty was thereby discharged.

Questions of this sort are among the most difficult that can arise, and the court can derive but little assistance from the authorities. The law is plain enough, but the peculiar circumstances of each case often render it extremely difficult to ascertain the actual intention of the parties. Upon the whole, we are of opinion that this was a continuing guaranty; and the plaintiffs must have judgment for one thousand dollars and interest.

District Court of the United States, Maine, March 30, 1840, *at Portland.*

THE HULL OF A NEW BRIG.

By the general maritime law, material men, who perform labor or furnish materials for building or repairing a vessel, have in addition to the liability of the owner, a lien on the vessel for their security. But this principle of the maritime law has never been adopted by the common law.

By the maritime law of the United States, material men have a lien on the vessel for supplies furnished a foreign vessel, but not for supplies for a domestic vessel. And for the purposes of the lien every vessel is considered foreign when in a port of a state to which she does not belong.

The statute of Maine, of Feb. 19, 1836, ch. 626, giving to 'all ship-carpenters, caulkers, blacksmiths and joiners and other persons who perform labor, or furnish materials for or on account of any vessel building or standing on the stocks by virtue of a written or parol agreement,' a lien on the vessel, does not include the case of a laborer, hired generally, and employed in various work, so as to give him a lien on the vessel for his wages for such part of the time as he may have been employed in work for the vessel.

THIS was a libel against the hull of a new brig built during the last season by David Spear. It was alleged in the libel that Spear commenced building the vessel in April last, and that the hull was finished and launched on the 6th of February; that the libellant was employed by Spear in building her and that there remains due to him for his services the balance stated in the schedule annexed to the libel amounting to $116 64, which he has demanded and which remains now unpaid, for which he claimed a lien on the vessel for his security and praying that the vessel may be decreed subject to the lien and sold for the payment of what is due.

Spear was duly served with process but did not appear; but Mr Purinton intervening for his own interest entered an appearance and filed a claim as owner, and put in an answer in the nature of a plea to the jurisdiction, alleging that at the time when the labor is said to have been performed, the vessel was and ever since has been wholly owned by citizens of this state, viz. by said Purinton the respondent; that she is a domestic vessel; and concluding with a prayer that the libel may be dismissed. Afterwards upon a suggestion from the court that the objection to the jurisdiction could not be sustained, he put in an answer to the merits, alleging that the vessel was built by Spear for him, denying all knowledge of the libellant having been employed or having rendered any service in building the vessel and putting him to the proof of his claim.

Evidence of the declaration of Spear was offered by the libellant tending to prove, that, by the terms of the contract he was specially engaged for work upon this vessel, but the evidence was ruled to be inadmissible.

The case was argued by *Fox* for the libellant, and by *C. S. Daveis* for the respondent.

WARE J. The plea to the jurisdiction has been very properly abandoned at the argument. The objection was presented in precisely the same form in the case of *Peyroux v. Howard*, (7 Peters, 324;) that is, that all the parties were citizens of the same state, and overruled both in the district and supreme court. The same question was raised and decided in the same way in the case of *Davis v. A New Brig*, (Gilpin, 474.) In cases of admiralty and maritime jurisdiction the competency of the court does not depend on the citizenship of the parties. The jurisdiction is founded on the subject matter and attaches whoever may be the parties and wherever they may reside. And that contracts of material men, for materials found and labor performed in building and repairing vessels, are matters of admiralty and maritime jurisdiction has been too often decided to admit of controversy at this day. Over these contracts the admiralty exercises a general jurisdiction. It will in all cases give a remedy *in personam;* and whenever the law gives a lien or privilege against the vessel it will enforce it by process *in rem*. *The General Smith*, (4 Wheaton, 438.) *The Aurora*, (1 Wheat. 125.) *The Jerusalem*, (2 Gall. 345.) *The Robert Fulton*, (1 Paine, 620.) *The St. Jago de Cuba*, (9 Wheat. 409.) *The New Jersey*, (1 Peters' Ad. Rep. 223.) *The Eagle*, (Bee. 78.) In every proceeding *in rem*, therefore, founded on such contracts the question is not, whether the court can take cognizance of the subject matter, but simply whether, in the particular case, the creditor has a right to look to the vessel itself for his security, or is confined to his personal remedy against the debtor.

By the general maritime law, material men, under which terms, in the language of the admiralty, are included all persons who supply materials or labor in building or repairing vessels, or furnish supplies

which are necessary for their employment, as provisions for the crew, have, in addition to the personal liability of the debtor, a lien on the vessel for their security. *Ordinance de la Marine, Liv.* 1. *Tit.* 14. *Art.* 16. 1 *Valin* 363. *Consolat. de la Mer. Ch.* 32, 33, 34. *Boucher's translation. Cleirac. Jurisdiction de la Marine, p.* 351. *Art.* 18. *No.* 5, 6. It is commonly said that this principle was borrowed by the maritime from the civil law. *Abbot on Shipping, p.* 108—9. But it seems more probable that it originated in the maritime usages of the middle ages, where we find the origin of all the general principles of the law of the sea. The Roman law did, it is true, allow to those who loaned money for the building, repairing or the supplying of vessels a privilege against the vessel. *Dig.* 20, 4, 5 and 6. *Dig.* 42, 5, 26 and 34. But in that law a privilege did not amount to an hypothecation. *Peckius Ad rem Naut; Note of Vinnius* 6, *page* 233. *Voet Ad. Pand.* 20, 2, 28, and 20, 4, 19. *Vinnius Select. Juris Quaest. Lib.* 2. *C.* 4. *Heinn. Ad Pand. Pars.* 6. *N.* 263. The first only gave a *jus prælationis*, a right of prior payment out of the thing, before it could be taken by unprivileged creditors. It was like the priority laws of the United States, and did not attach as a lien on one thing. And the privilege of material men for supplies furnished for a vessel was also postponed that of the fisc. But hypothecation gives a *jus in re*, a species of proprietary interest in the thing itself. And in the maritime law every privilege imports a tacit hypothecation. *Emerigon, Contrats a la Grosse, ch.* 12, *sect.* 1 and 2. If, therefore, it was adopted from the Roman law, it was adopted with an important modification, giving to the privileged the rights of an hypothecary creditor, and raising the privilege to an hypothecation.

But this principle of the maratime law is not acknowledged by the common law and has never been received by the commercial jurisprudence of England. *Abbot on Shipping*, 109. It has, however, been partially adopted in the maritime law of the United States. Our law allows the lien when the supplies are furnished to a foreign vessel, and for the purpose of the lien, a vessel is considered as a foreign vessel when she is in a port out of the state to which she belongs or where her owners reside. But when supplies are furnished to a vessel in the state where she belongs and is owned, no lien is created by the maritime law of the United States. If, however, it is allowed by the local laws of the state it may be enforced by process *in rem* in the admiralty.

In the present case the labor was performed on a new vessel owned in the place where she was built, and being a domestic vessel whether the creditor has a lien upon her for the value of his services depends entirely on the law of the state. The lien is claimed under an act of he legislature of Maine, of Feb. 19, 1834, ch. 626, sec. 1. This act provides ; "That from and after the passing of this act, all ship-carpenters, caulkers, blacksmiths and joiners or other persons, who shall perform labor or furnish materials for and on account of any vessel build-

ing or standing on the stocks, *by virtue of any written or parol agreement*, shall have a lien on such vessel for his or their wages until four days after said vessel is launched, and may secure the same by an attachment on said vessel; which attachment shall have precedence of all other attachments where no such lien exists." That labor was actually performed by Read in the building of the vessel has been sufficiently proved and is not now denied. The question which has been discussed at the bar is, whether it was performed under such circumstances, as entitle him to the benefit of the law. For it is not sufficient that materials be furnished, or labor and service rendered in the construction of a vessel. This must be done by virtue of an agreement; and what sort of an agreement will bring a party within the privilege of the act is the precise question, which is involved, and has been learnedly argued in this case.

There was no written contract between the parties, and there is no direct proof of the terms of the agreement, by which Read was engaged. They are left by the testimony to be inferred from the circumstances under which the agreement was made and the manner in which the contract, whatever it might be, was executed. It appears that about the 16th or 17th of April, Read came to the house of Capt. Spear, the builder, a stranger and by birth a foreigner, in a state of great destitution, and wished for employment. Spear took him into his house, furnished him with some clothing and employed him a few days for his board. He then left and went to Portland to seek business but being unsuccessful in obtaining it, he returned and was again employed by Spear; and continued in his service until November, when he was finally discharged. For the first month he was employed exclusively in gardening, planting, laying stone wall and other labor on the farm. About the beginning of June he went into the smithery and was engaged part of the time at his trade as a blacksmith, in doing the iron work for the vessel. Butman, one of the witnesses, who was also employed as a blacksmith for two months and eight days from the 19th of May, says that during that time he constantly worked with Read, and that about half the time they worked in the shop and about half of the time on the farm, on the highways, in the woods getting timber and various work. After that period and until Read was finally discharged his employment was not wholly, but most exclusively upon the vessel, either in the shop preparing the iron work, or in the yard boring on the ship. While in the smithery, however, he was not wholly occupied in work for the vessel, but occasionally did other jobs which were brought by the neighbors to the shop, but all on Spear's account. The proportion of the time employed upon the vessel is not clearly proved, but is estimated by some of the witnesses as about three-fourths of the whole period from the commencement to the close of his employment.

It has been already observerd that the statute does not create a lien for materials and labor upon the simple and naked fact that they have been actually employed in the building of the vessel; the lien arises

only when the materials and labor are furnished by virtue of a previous agreement. The argument of the libellant's counsel is, that the performance of the labor or the supply of the materials having been proved, and the actual appropriation of them to the finishing of the vessel, it is unnecessary to proceed further and show the agreement, in pursuance of which it was done; but the fact that it was done in the execution of a previous contract, results as a presumption of law. To a certain extent this is undoubtedly true. If labor has been performed for another with his knowledge and under his direction, or goods have been furnished, received and consumed by him, the law will certainly imply from these facts, an agreement. But what agreement will be presumed? Why, on the part of the person who receives the benefit, that he agreed to pay what they were reasonably worth, and ordinarily nothing more. Suppose a man, who is by trade and occupation a ship builder, hires a laborer to work for him a year, but the particular terms of the engagement, except its duration, are not susceptible of proof, the law will imply nothing more than that he should perform such services as are usually required of hired laborers, and after the contract is executed, that the hirer shall pay him a reasonable compensation for such services. Again, suppose such a ship builder to purchase a quantity of lumber suitable for ship building; if the particular terms and conditions of the contract do not appear, the law will imply nothing more on the part of the purchaser ordinarily, than a promise to pay what it is worth. A contract or agreement requires, as essential to its existence, the assent of two or more minds; *duorum vel plurium in idem placitum consensus.* *Dig.* 2, 14, 1, 51. If particular pacts or conditions are annexed to the contract, qualifying its general nature or varying and modifying its general obligations, there must be the same assent of the parties to these conditions to give them validity, as to the substance of the contract. It must be a consent *in idem placitum.* If the parties have not taken care to express these accessory conditions in the terms of the contract, or what juridically amounts to the same thing, if they cannot be proved, the law will not presume the assent of the parties to them, unless, from the circumstances of the case, or the ordinary course of dealing, these are plainly to be inferred.

Let us now apply these general and familiar principles of law to the evidence in this case. The fact, that the libellant labored for Spear, and under his direction from April to November, and that he was part of the time employed upon the vessel is admitted. That the labor was performed by virtue of an agreement, will be inferred as a presumption of law. But the law will infer from the general fact, nothing more than a general contract for labor; and what is there in the present case that will authorise the presumption of anything beyond this. Nothing, except what results from the manner in which he was actually employed, and the fact that he was a blacksmith by trade. As to the kind of labor in which he was employed, it appears that for the first month he was exclusively occupied in various work

on the farm; for the two following months about one half of the time on the farm, and one half in the blacksmith's shop; and during the residue of the term of his service, principally in the shop at his trade, in doing the iron work for the vessel, or in the yard working on the ship; but part of it also, on the farm. Taking then the whole course of his employment, the result will be against this presumption of a special contract with him as a mechanic for labor on the vessel. Whatever presumption might arise from the fact that he was by trade a blacksmith, is overcome by the various kinds of labor in which he was employed without any objection on his part. The inference certainly is, that he was hired rather as a sort of Jack-at-all-trades, than as a master of one. And this receives confirmation partially at least, by all the evidence which has been offered touching the rate of wages for which he was engaged. It appears from his own declaration, that Spear would consent to give him but fourteen dollars a month, though he said that he ought to have sixteen. But all the proof is, that the rate of wages for a blacksmith at this time, was not less than a dollar a day, about double the rate at which he was to be paid. It appears to me, that the fair conclusion to be drawn from all these facts is, that this was a general agreement for service as a hired laborer, and not a special contract for any specific kind of labor.

Does a person hired as a laborer generally, and employed under that general contract part of the time in work upon the vessel, come within the fair intent and meaning of the legislature, so as to be entitled to a lien on the vessel for his wages during that part of the time that he is so employed? The language of the law is, that any persons of the description named in the act, who shall perform labor and furnish materials *for or on account of any vessel by virtue of a written or parol agreement.* The labor must be performed, or the materials furnished in pursuance of an agreement, and it must be an agreement to do this for or on account of the vessel to which the lien attaches. The intention of the law is to give to that class of persons, called in the language of the admiralty, material men, a privilege against the vessel for their security, not universally, and in all cases where their labor or the materials furnished by them have been applied to the building of a vessel, but where this has been done under a contract for or on account of the vessel to the use of which they have been appropriated. The contract must therefore have itself a reference, tacit or express, to the vessel against which the privilege is claimed. It is not intended to be said, that in all cases a mechanic who is employed in building a vessel, or a material man who sells lumber which is used in the construction of it, must, in order to maintain a lien, prove that the vessel was expressly named in the contract. In ordinary cases, or certainly in very many cases this will be presumed. And these contracts being made while the vessel is in the process of building, and the labor or materials appropriated to her construction, it would require some countervailing circumstances to overcome the natural presumption, that the contracts were made with a view to the particular vessel. I fully

agree also with the libellant's counsel, that, the lien being one beneficial to the general interests of commerce, and having its foundation in natural equity, the law ought to receive a liberal construction to carry into full effect the beneficient intentions of the legislature. It belongs to that class of liens which the law habitually favors. And the act being in fact a mere recognition or adoption of a principle of the general maritime law, as old as the law itself, a court of admirality would be the last tribunal to feel any reluctance in giving it its fullest and most beneficial operation. But to extend the privilege to a case like the present, would be carrying the lien beyond what seems to me to be the obvious and clear intention of the legislature, and also further than it would be supported by the principles of the general maritime law.

DIGEST OF AMERICAN CASES.

Selections from 9 and 10 Vermont Reports.

AGENT.

Where an agent, authorized to settle a debt due the estate, takes a note to the administrator for the principal sum due, and one to himself for usurious interest, the first note is not void, unless the administrator knew of the usury and assented to it.—*Baxter, Administator, v. Buck*, 10 Ver. 548.

ASSIGNMENT.

When all the notes, secured by a mortgage, are assigned, the mortgage passes with them, but when a part only are assigned, whether the whole mortgage, or a proportionate part, or any interest therein, is assigned, depends on the real contract and actual agreement of the parties.—*Langdon v. Keith*, 9 Ver. 299.

ATTORNEY.

Where an attorney procures money to be advanced, by a third person, in the prosecution of an action, without attempting to pledge the credit of his client therefor, the attorney alone is responsible to such third person.—*Bell v. Mason*, 10 Ver. 509.

BAILMENT.

1. If the general owner of chattels parts with the possession for a definite term, he cannot sustain trespass or trover for an injury done to the thing, during the continuance of the term.—*Swift v. Moseley*, 10 Ver. 208.

2. But if the bailee apply the thing to a different use from that for which it was bailed, his interest is determined, and the bailor may sustain trover for the injury, against all concerned in the transaction. For instance, if the hirer of a chattel for a year sell it during the year to one knowing his interest, the owner of the chattel may sustain trover against the purchaser. —*Ib.*

BANK-CHECK.

1. Where a forged check purporting to be drawn by a customer on a bank, where such customer keeps a deposit, is paid at such bank to an innocent holder who paid a valuable

consideration for it, and who had no knowledge of the forgery, such bank cannot recover of such holder the amount so paid.—*Bank of St. Albans v. Farmers' and Mechanics' Bank*, 10 Ver. 141.

2. If such check is purchased by another bank, in good faith, and is received in the course of business by the drawee, and passed to the credit of the bank that purchased it, and notice of the forgery is not given the bank so purchasing it until two months afterwards—the bank, on which the check purported to have been drawn, thereby makes the loss its own.—*Ib.*

3. In such a case, notice of the forgery should be immediately given, to entitle the drawee to a recovery. —*Ib.*

BOND.

In a breach of the conditions of a probate bond, many things, which will not amount to a legal defence, will reduce the damages.—*Probate Court v. Bates and another*, 10. Ver. 285.

BOUNDARY LINE.

1. A mutual recognition, by adjoining proprietors, of a wrong line, and their acquiescence in such line, and unless accompanied by a continued possession by one or both, for fifteen years, is not conclusive as to their title.—*Crowell v. Bebee*, 10 Ver. 67.

2. A grant or exception of a certain number of acres off the west end of a lot in a rectangular form, and the sides being toward the cardinal points is, in legal intendment, to be divided from the lot by a line parallel with the lot lines.—*Rich v. Elliot*, 10. Ver. 211.

3. Parol evidence is not admissible to contradict such intendment, and show that the parties intended the line to be neither straight nor parallel with the lot lines.—*Ib.*

CASE.

A person, finding horses trespassing on his land, may turn them into the highway, and is not liable, though they may be lost in consequence of being so turned into the highway.—*Humphrey v. Douglas*, 10 Ver. 71.

CONSIDERATION.

1. Where, on the purchase of a patent right, notes are given for the consideration, and those notes are paid after the purchaser had full knowledge, or the means of knowledge of all the facts, such payment is voluntary, and there cannot be a recovery back of the sum paid; although the purchaser might have avoided payment of the notes for want of consideration.—*Stevens v. Head*, 9 Ver. 174.

2. If one procure another to become his surety, and subsequently procure a third person to sign a promise of indemnity to the first surety, there being no new consideration, and this not being done in consideration of any contract, made at the time of the original contract, the contract of indemnity is void, for want of consideration. —*Rix v. Adams and another*, 9 Ver. 233.

CONTRACTS.

1. A contract executed cannot be dependent upon an executory contract. Hence, where one or two parties executed an assignment, absolute in its terms, of a lease, and at the same time gave a separate writing to surrender the possession on a future day, and the assignee, at the same time, contracted in writing with the assignor, to pay a sum of money on the day before the time of said stipulated surrender, it was held, that on a refusal of the assignor to surrender, according to his contract, the assignee might maintain ejectment for the premises, without having made such payment. —*Strong v. Garfield*, 10 Ver. 497.

2. Where a gun was sold to be paid for in sawing; Held, that there could be no recovery, until logs were carried to be sawed, so that the party

could fulfil his contract.—*Downer v. Frizzle*, 10 Ver. 541.

3. Where the defendant had sawed logs for the plaintiff on such a contract, in part, and sued the plaintiff and recovered therefor; Held, that this did not entitle the plaintiff to maintain an action for the gun, without any demand for the sawing, but that he should have resisted the recovery when sued by defendant.—*Ib.*

DEED.

One, who takes a conveyance of land from one long out of possession, while another has been in the open visible possession, having an unrecorded deed of the same, will be affected with notice of such deed.—*Griswold v. Smith and another*, 10 Ver. 452.

EVIDENCE.

1. Where, on the sale of articles of personal property, a bill of sale is given, describing the property sold, and receipting the price, but containing no warranty; Held, that the purchaser could not give parol evidence to prove a warranty.—*Reed v. Wood*, 9 Ver. 285.

2. If the opposite party, in whose possession a deed is presumed to be, is out of the state, notice to his counsel, to produce the original, is sufficient to warrant the introduction of secondary evidence of its contents.—*Mattocks v. Stearns and Wife*, 9 Ver. 326.

3. The validity of a sheriff's sale does not depend upon any thing subsequent to the sale, and if the officer makes no return, the sale may be proved by parol.—*Gates v. Gaines*, 10 Ver. 346.

FEME COVERT.

A feme covert cannot, either separately, or jointly withh er husband, execute a valid power of attorney, to convey lands held in her right.—*Sumner v. Conant*, 10 Ver. 9.

FLOWING LAND.

A right to flow, derived from grant, is not lost by non-user, when it cannot be used without disturbing the right of others, but may be exercised whenever the right of others can be extinguished or bought.—*Mower and another v. Hutchinson*, 9 Ver. 242.

FRAUDS, STATUTE OF.

A promise to pay the debt of a third person is a collateral promise, and within the statute of frauds, and must be proved in writing, if the original debtor still remains liable for the debt; but if, by the terms of the contract, the original debtor is discharged, and it remains no longer a debt against him, it is an independent contract, and not within the statute.—*Anderson v. Davis*, 9 Ver. 136.

HIGHWAY.

If a road be out of repair, and an injury happen by reason of such want of repair, and the plaintiff or his agents are guilty of no want of care and prudence, the town is liable, notwithstanding the primary cause of the injury was a failure of a nut or bolt, which was insufficient or improperly fastened.—*Hunt and wife v. Pownal*, 9 Ver. 411.

LIEN.

If an attorney receive a demand for collection, and the debtor leave demands with the same attorney for collection, the avails to be applied on the first demand when realized, this creates no lien on the demands left by the second creditor, in favor of the first creditor, or of the attorney, for the security of the first debt.—*Goodrich v. Mott*, 9 Ver. 395.

LIMITATIONS, STATUTE OF.

In an action on the case for deceit, it is not a sufficient answer to the statute of limitations, that the plaintiff was ignorant of his cause of action, until within six years, although that

ignorance was occasioned by the nature of the deceit, or the manner, in which the fraud was perpetrated.—*Smith v. Bishop*, 9 Ver. 110.

MORTGAGE.

1. The sale and conveyance of real estate, in payment of a pre-existing debt, with a simple right of repurchase on the part of the debtor, is valid, and is not a mortgage, even in equity.—*Baxter v. Willey*, 9 Ver. 276.

2. But in such contract, it is essential that the debt be extinguished absolutely, *in presenti.—Ib.*

3. If the object of the contract be to secure the payment of the debt, and not to extinguish it, except upon the happening of some subsequent event, or the default of the debtor to pay by a given day, the transaction is a mortgage, and no form of words will enable the parties to foreclose the debtor's equity of redemption.—*Ib.*

POSSESSION.

If a person enter upon a tract of land, with visible boundaries, under a deed of the entire tract, his occupation and improvement of a part, is construed as possession of the whole. Such a possession, is co-extensive with the claim of title.—*Crowell v. Bebee*, 10 Ver. 33.

PROMISSORY NOTES.

Where a person, not a party to a note, signs his name on the back, without any words to express the nature of his undertaking, he is considered as joint promiser with the other signers, and if any of the other signers are merely sureties, he is considered as a co-surety with them.—*Flint v. Day*, 9 Ver. 345.

WITNESS.

1. If, by the terms of a contract to pay the debt of a third person, the original debtor is discharged, he is not a competent witness for the plaintiff to prove such contract.—*Anderson v. Davis*, 9 Ver. 136.

2. In an action brought by an administrator to recover a debt due the estate, the heir is not a witness on his releasing his interest in the debt. The administrator, also, should release him from cost.—*Baxter, Adm. v. Buck*, 10 Ver. 548.

INTELLIGENCE AND MISCELLANY.

SCENE IN AN ENGLISH COURT.

At the hearing of a case before the court of review, on the 18th of March, a report of which we find in the London Morning Herald, a singular scene occurred. A question arose as to the right of the Lancashire district bank to certain fixtures.

Mr Swanston said there were some ludicrous cases as to what were "chattels." There was a reported case whether a potato was a potato so as to make it a chattel.

Sir John Cross asked what court had heard the case. He knew if a potato was taken out of the ground and carried away it was not a felony, but if it was taken up, and remained on the ground some time, and the party returned and took it away, that it then became a felony.

Mr Swantson referred to the potatoe case. *Evans v. Roberts*, (5 B. & C.) The court held that the potatoes could be taken in execution.

Sir G. Rose expressed an opinion against the right of the bank to the fixtures.

Sir John Cross said the point in this case was novel and important, and he begged the argument to be continued. He had never heard in any court in this realm one learned judge express a decided opinion as his colleague had done, before the case was argued. He wished the case to go on, as he never gave his opinion until the case was argued on both sides, and he was sorry to hear the opinion expressed.

Sir George Rose said he had given it two hours ago.

Sir John Cross said he heard the remark with deep concern, and he must say that he did not think it right for one judge to say his mind was made up in a case, when another judge was trying to arrive at a proper conclusion.

Sir George Rose—It is quite a mistake, Sir John. This is another point.

Sir John Cross repeated what he had said.

Sir George Rose—I do assure you, Sir John, it is a great mistake. They are going on another point.

Sir John Cross—Let the case go on. I never give an opinion before I have heard all.

THE FIRST LAW BOOK.

MACKLIN at first designed his son for the law, and for this purpose entered him in the temple, where he procured him chambers, a library, &c., rather above what he could afford, considering the casualty of his income. 'And what book, sir,' said the veteran in telling this circumstance, 'do you think I made him begin with? Why, sir, I'll tell you,—the Bible—the Holy Bible.' 'The Bible, Mr Macklin, for a lawyer!' 'Yes, sir, the properest and the most scientific book for an honest lawyer, as there you will find the foundation of all law, as well as all morality.'

MONTHLY LIST OF INSOLVENTS.

Insolvents.	*Occupation.*	*Place of Business.*	*Warrant issued.*
Baker, George, [*Whiton & Baker.*	Druggist,	Cambridge.	May 16.
Barney, James S.	Merchant,	New Bedford,	May 16.
Baston, Andrew	Trader,	Boston,	May 28.
Belcher, Elisha	Cordwainer,	North Bridgewater,	May 13.
Canterbury, Henry		Ware,	May 18.
Carlton, John D.	Trader,	Reading,	May 4.
Coburn, Joseph W.	Mason,	Dracut,	April 28.
Draper, Luke T.	Tailor,	Ware,	May 18.
Hartshorn, Caleb	Trader,	Boston,	May 18.
Ramsdell, Elbridge G.	Stabler,	Duxbury,	April 24.
Richardson, Warren	Trader,	Lowell,	May 27.
Stetson, Oliver	Trader,	Boston,	May 30.
Thornton, John	Gentleman,	Boston,	May 19.
Tilton, George A.	Cordwainer,	Hopkinton,	Feburary 9.
Tripp, Oliver	Mariner,	New Bedford,	May 21.
Whiton, Charles [*Whiton & Baker.*	Druggist,	Cambridge,	May 16.

COLLECTANEA.

A law school has been recently established at Dublin, and bids fair to prove highly beneficial to the legal profession in Ireland. It starts under high auspices; the attorney and solictor general and many other distinguished members of the Irish bar being on the council.—In 1808 the entire number of the Essex, (Mass.) bar, was twentyseven, and of this number ten were residents of Salem, viz. Elisha Mack, Benj. R. Nichols, Wm. Prescott, Samuel Putnam, John Prince, jr., John Pickering, jr., Joseph Story, Samuel Swett, Leverett Saltonstall, and Joseph E. Sprague. Only one of the number now resides in Salem in the active pursuit of the profession. Of the others, five reside now in Boston, two as counsellors at law, two as retired from the profession, and one is on the bench of the supreme judicial court of Massachusetts; one resides at Cambridge, and the remaining three reside in Salem; one is judge of the police court, another clerk of the courts for Essex, and the third is sheriff of the county.—The following is one of the numerous advertisements of a like character to be found in the London papers: "LAW. A gentleman thirty years of age, of most active and assiduous habits of business, highly respectable connections, and many years' general experience, acquired up to the present time in offices of the highest reputation, particularly in the common law and conveyancing departments, having a small city and agency practice, and being anxious for active employment, wishes to join a gentleman or firm as JUNIOR PARTNER, or with a prospect of partnership. Any gentleman or firm who may wish to be relieved from the more arduous part of practice, would find the advertiser, from his reputation, knowledge of and attention to business, worthy of notice.—Address Lex, Messrs Richards and Co., law booksellers, 194 Fleet-street."—Theophilus P. Chandler, of Boston, has been appointed by the governor of Pennsylvania, a commissioner to take depositions, &c. to be used in that state;—P. S. Wheelock, of Boston, has been appointed by the governor of New Hamshire, a commissioner to take depositions, &c. to be used in that state.—J. P. Healey, of Boston, has been appointed commissioner, &c. for New York

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NEW PUBLICATIONS.

THEORY of Legislation. By *Jeremy Bentham*. Translated from the French of Etienne Dumont, by R. Hildreth. Boston: Weeks, Jordan & Co., 1840. [A notice of this work will appear in our next number.]

Reports of cases argued and determined in the several courts of Law and Equity in England, during the year 1839. *Jurist Edition*. Vol. I. New York.

A treatise on the Law of Evidence. Fifth American from the eighth London edition, with considerable additions. By *S. March Phillipps*, Esq, and *Andrew Amos*, Esq., Barristers at Law. With notes and references to American Cases. Parts I. and II. New York.

A Treatise on the Law of Insurance. By *Willard Phillips*. In two Volumes. Second Edition. Boston.

Reports of cases argued and determined in the Court of Chancery of the State of New York. By *Alonzo C. Paige*, Counsellor at Law. Vol. VII. New York.

Digested Chancery Cases, contained in the Reports of the Court of Appeals of Maryland. By *James Raymond*, of the Maryland Bar. Baltimore.

Commentaries on the Law of Bailments, with illustrations from the Civil and the Foreign Law. By *Joseph Story*, LL. D. Second Edition. Revised, corrected, and enlarged. Boston.